

**SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

SUZANNE M. FERARI,

Petitioner,

v.

LEWIS COUNTY and ROBERT J.
THOMPSON,

Respondents.

SHB NO. 05-033

ORDER DISMISSING APPEAL

This is an appeal of a Lewis County decision dated March 28, 2005, approving a shoreline substantial development permit (SDP) to operate, expand, and reclaim an existing sand and gravel mining operation in Lewis County, Washington. This matter is before the Shorelines Hearings Board (Board) on Respondent Robert J. Thompson's Motion to Dismiss for Lack of Jurisdiction. Attorney David Dicks represented Petitioner Suzanne M. Ferari. Deputy Prosecuting Attorney Michael Golden represented Respondent Lewis County, and Attorney Craig D. Magnusson represented Respondent Robert J. Thompson. The Board consisted of William Lynch, Chair, and Kathleen D. Mix, Andrea McNamara Doyle, Mary Alyce Burleigh, Judy Wilson, and John Bolender, members. Cassandra Noble, Administrative Appeals Judge, presided for the Board.

The Board decided this motion on the written record, consisting of:

1. Respondent Thompson's Motion to Dismiss for Lack of Jurisdiction;

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2. Appellant Ferari's Memorandum in Opposition to Respondent Thompson's Motion to Dismiss for Lack of Jurisdiction, with exhibits; and
3. Reply of Respondent Thompson in Support of Motion to Dismiss for Lack of Jurisdiction with exhibits.

I. BACKGROUND

On December 9, 2005, Petitioner Susanne M. Ferari filed a Petition for Review with this Board appealing Lewis County Amended Shorelines Substantial Development Permit (SDP) No. SHD 96-011 issued to Robert J. Thompson Gravel Pit by Lewis County on March 28, 2005. On April 8, 2005, Petitioner Ferari filed a Petition for Appeal with Lewis County Community Development, appealing Lewis County's issuance of the SDP to the Lewis County Hearings Examiner, who denied Ferari's appeal on September 13, 2005. Appellant's Memorandum in Opposition to Motion to Dismiss, Exhibit A. Respondent Thompson asserts that, following Petitioner's appeal and the Lewis County Hearing Examiner's dismissal, Lewis County notified her of the Hearing Examiner's decision. Petitioner does not dispute that she received notice of the Hearing Examiner's decision. She asserts that she did not receive notice of the transmittal of the County's final decision and the Hearing Examiner's dismissal to Ecology. Respondent Thompson's Motion to Dismiss, page 2, Appellant's Memorandum in Opposition to Respondent Thompson's Motion to Dismiss, page 3 and Exhibit G. After the local 30-day appeal period had passed, Lewis County forwarded the approved SDP, as is required by the Shoreline Management Act. The County also sent Ecology the staff report and the Hearing Examiner's dismissal of Ferari's administrative appeal. Ecology received the SDP decision materials on November 10,

1 2005. By December 1, 2005, the end of the 21-day statutory appeal period for SDP permit
2 decisions of local shoreline jurisdictions, no appeal had been filed with this Board.

3 When Petitioner Ferari commenced her appeal with this Board on December 9, 2005, it
4 was eight days after the close of the appeal period. She asserts that the reason for her late filing
5 was the failure of Lewis County to notify her attorney that the final permit had been forwarded to
6 Ecology. Petitioner's attorney called the Lewis County Planning Department in October, 2005
7 to ask whether the County had forwarded its final decision to Ecology. When he was informed
8 in October that the County had not yet sent the decision to Ecology, Petitioner's attorney
9 verbally requested Lewis County staff to notify him when the final decision was filed with
10 Ecology. He then waited to be notified. Decl. Dicks, p.2, No.9. Some weeks later, having
11 received no communication from Lewis County in response to this request, Ferari's attorney
12 again contacted the County on December 7, 2005 by leaving an e-mail message with the Lewis
13 County Planning Department. The following day, the County informed the attorney by return e-
14 mail that the County had already sent its final decision to Ecology on November 8, 2005.

15 Petitioner's Response Brief, Exhibit G. This is substantiated by a November 7, 2005 transmittal
16 memo from the Lewis County Shorelines Administrator to Ecology that apparently accompanied
17 the County's final decision on the SDP permit. Petitioner's Response Brief, Exhibit E. The
18 memo indicated that a letter had been sent to the applicant explaining that "...Ecology has 21
19 days to review these materials after receiving them ("date of file") as per WAC 173-27-190(1)."
20 Petitioner's Response Brief, Exhibit E. There is no indication in the record that Petitioner was
21 sent a copy of the November 7 memo. It is undisputed that neither the Petitioner nor her attorney

1 received notice prior to December 8, 2005 that the County had forwarded its final decision to
2 Ecology. Decl. Dicks, p. 2 Nos. 10 and 11. After her attorney discovered on December 8 that
3 the decision had already been submitted to Ecology, Petitioner Ferari filed her Appeal with the
4 Board on December 9, 2005.

5 **II. ANALYSIS**

6 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
7 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
8 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary
9 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
10 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
11 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
12 *Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d
13 1004 (1991).

14 The party moving for summary judgment must show there are no genuine issues of
15 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
16 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
17 summary judgment proceeding is one that will affect the outcome under the governing law.
18 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
19 and reasonable inferences must be construed in favor of the nonmoving party as they have been
20 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). There are no
21 disputed genuine issues of material fact with regard to this summary judgment motion. The only

1 issue before the Board is a legal one: whether Petitioner Ferari’s challenge to the SDP should be
2 dismissed on the grounds that the Petition was untimely filed with the Board.

3 RCW 90.58.180(1) sets forth the requirements for appeals of locally-issued substantial
4 development permits. It provides:

5 Any person aggrieved by the granting, denying, or rescinding of a permit on
6 shorelines of the state pursuant to RCW 90.58.140 may...seek review from the
7 shorelines hearings board by filing a petition for review within twenty-one days of
the date of filing as defined in RCW 90.58.140(6).

8 RCW 90.58.180(1).

9 The term “date of filing” is statutorily defined:

10 Any decision on an application for a permit under the authority of this section,
11 whether it is an approval or a denial, shall, concurrently with the transmittal of the
12 ruling to the applicant, be filed with the [Department of Ecology] and the attorney
general. With regard to a permit other than [a variance or conditional use permit],
“date of filing” as used herein means the date of actual receipt by the [Department
of Ecology].

13 RCW 90.58.140(6).

14 In the instant case, Petitioner argues that she was unable to file her petition within
15 twenty-one days of the date of filing because she failed to receive notice of Lewis County’s
16 transmittal of its decision to Ecology. She does not contend that she was unaware of the decision
17 denying her administrative appeal to the Lewis County Hearing Examiner. Nor does Petitioner
18 contend that she failed to receive notice of the final action by Lewis County. Notice may be
19 deemed adequate if it apprises affected parties of the nature and character of an action fairly and
20 sufficiently. *Barrie v. Kitsap County*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1974). Thus, even if
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1 Petitioner did not receive notice of the transmittal of the decision to Ecology, Petitioner did have
2 actual notice of the decision and was timely apprised of Lewis County's final action on the SDP.

3 In the same code section that required notice to the Petitioner of the County's final action,
4 the Lewis County Code provides for transmittal of all final actions on SDP's to Ecology within
5 eight days.

6 Within eight days of final action on any application for permit, the director shall
7 notify in writing the following persons of such final approval, disapproval, or
conditional approval of a substantial development permit;

- 8 (a) The applicant;
9 (b) Washington State Department of Ecology;
10 (c) Washington State Attorney General;
(d) Lewis County prosecuting attorney; and
(e) Any person who has submitted to the director written comments on the
application or who has written the director requesting notification.

11 LCC 17.25.110.

12 Because Petitioner did receive notice of the final action by Lewis County, it is reasonable
13 to expect Petitioner to anticipate the transmittal to Ecology within a short time of the issuance of
14 the decision and her notice of it in accordance with LCC Sec. 17.25.110. It is also reasonable to
15 observe that Petitioner could have, but apparently did not, exercise the option of checking with
16 Ecology about the status of the transmittal. Petitioner's attorney's phone call in October, 2005
17 can fairly be characterized as a request for courtesy notification and it placed the entire burden
18 on County staff to provide individual notice to her of the transmittal. While it is perhaps
19 regrettable that the County did not contact Petitioner's attorney when it forwarded the decision
20 materials to Ecology in early November, it was not a legally enforceable request.

1 Neither Ecology nor Lewis County was required by law to provide Petitioner with notice
2 of the date of filing of the decision with Ecology. Ecology is charged with providing written
3 notice only to the local government and the applicant of the “date of filing.” WAC 173-27-
4 130(8). Lewis County was required by the Shoreline Management chapter of the Lewis County
5 Code only to provide written notice to the Petitioner within eight days of “final action on any
6 application for permit.” LCC 17.25.110. No requirement has been cited to the Board that the
7 County notify other persons of the “date of filing,” as that term is defined by WAC 173-27-
8 130(8) in the context of SDP decisions.

9 This Board is an administrative agency. Any administrative agency has only those
10 powers specifically granted to it by statute or necessarily implied. For example, “[t]he PCHB,
11 being a creature of statute, has only those powers, expressly granted to it or necessarily implied
12 therein.” *City of Seattle v. Ecology*, 37 Wn.App. 819, 823, 683 P.2D 244, 246-247(1984). There
13 is no allegation in this case that Petitioner received no notice at all of the County’s decision.
14 Although Petitioner’s attorney requested notice of the transmittal (the “date of filing”) of the
15 decision to Ecology, no requirement in law has been cited that would provide this Board with the
16 authority to accept an appeal that has been filed beyond the statutory deadline circumscribing the
17 jurisdiction of the Shorelines Hearings Board. This appeal was filed with the Board eight days
18 too late to invoke that jurisdiction.

19 Based on the foregoing analysis, the Board enters the following
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SO ORDERED this 10th day of May 2006.

WILLIAM H. LYNCH, Chair

KATHLEEN D. MIX, Member

ANDREA McNAMARA DOYLE, Member

MARY ALYCE BURLEIGH, Member

JOHN BOLENDER, Member

JUDY WILSON, Member

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